Senator Joseph Biden
U.S.Senate
Washington, D.C. 20510

7627 Old Receiver Road
Frederick, Md. 21701
August 2, 1987

Dear Senator Biden,

I am a former Wilmingtonian, Morning News reporter (probably before you were born) and I write to oppose confirmation of Judge Bork, from personal experience with him as a judge and from what I know of his record. I believe he is and will be an activist on the Supreme Court, and a government partisan, which I regard as a form of subversion in our system of self-government and our concepts of freedom.

I enclose a page from a Reporters Committee summary of his cases. I'm past 74, have been in poor health for years, and do not have a clear recollection of all of the decisions cited. I am clear, however, on the activism reflected in the language I'll cite. I note, however, that the decision was written by another former Department of Justice official. It would not be unusual if he'd been involved in my fairly extensive FOIA litigation. Judge Scalia was and that did not keep him from sitting and judging, in effect, on himself.

"The names of two informants" was never an issue in the litigation. The names had been disclosed, of more than two. Four were disclosed by the government, voluntarily. One over his written objections because the government believed he would be used by the House Select Committee on Assassinations in ways the government would have liked him used. The fifth went public himself. He appeared on TV in St. Louis to make his public confession. I provided tapes to Department counsel and to the appeals officer. The question was not of identification, which any reporter or former reporter would oppose, but of the records relating to what he did. And what he did was to penetrate the defense in a sensational criminal case, that of James Earl Ray, charged with killing Dr. King. The other symbol informer I refer to above, also did that- and much more - for the FBI. He is Oliver Patterson and while an FBI informer he had locally sensational activity in local political issues. Patterson, who resented being forced into the position in which the FBI put him by disclosing his identification to the House committee over his objections, gave me a privacy waiver and under compulsion of the district court the FBI did disclose some of the pertinent records to me. I loaned them to the St. Louis Post- Dispatch and it ran four page-one stories based on them, stories it also syndicated extensively. With some embarrassment to the government, I'm confident.

Another symbol FBI informer, of its Birmingham field office, was also turned over to the House committee, with the records including his name and symbol, disclosed to me. I think his name was Davis. Still another FBI informer, name disclosed to me, is Marjorie Fetters, of Camden, N.J. She took James Earl Ray's brother, Jerry, to her bed and provided information to the FBI. The question was not of her name but of the records underlying the disclosed paraphrases. The court records are quite clear on all of this and much more.

Still another disclosed informer was a Chicago woman who was an informer inside the mafia. The FBI was so without interest it never responded when I called to its attention the fact that she might get killed. They never asked for the return of that record and thus I'm confident that it is still readily available in its public reading room. I wrote the Department, out of concern, and it did not reply.

This appeals court makes up what it wants to serve its activism. In this same litigation, with the question of counsel fees, it held that if I had used the words "freedom of information" rather than "information" only followed by "request," more of that litigation could be considered for counsel fees. At the time in question, before the 1974 amending of the Act (part of which, the investigatory files exemption, was amended over one of my earlier suits), the proper procedure was to identify "information requests" as such and I have innumerable instances of response to requests

filed only as "information requests." In that particular litigation, to reflect the fact that absent litigation my requests were ignored, I produced a list of 25 that had been ignored. These were later the subject of a FOIA Senate subcommittee hearing, when Senator Abourezhk was chairman. Yet the Bork/Starr appeals court in what I regard as activism went outside the case record to invent a non-existing requirement. This is consistent with the campaign of the executive agencies, represented by the Department of Justice, to negate the Act itself to the degree the courts will tolerate and thus interfere with the legislated right of the people to know what their government does.

In this as in other of my FOIA litigation what is really involved, other than the usual stonewalling, is refusal to search for and process for disclosure what can be seriously embarrasing to the government.

Other of the represented issues before Judge Bork also are misstated and misrepresented. Take for example the names of FBI agents. The case record held the statement by then Director Kelley that such names would not be withheld in historical cases, of which the attorney general had held this is one. In addition, the FBI filed an affidavit in which it stated that policy was changed and required the disclosing of those names. In half the records they were disclosed. There is reason to believe embarrassment to the government was possible. Some of the Memphis special agents referred to blacks as "monkey-faced" and to black men as "boys." (Oh, yes, the FBI also disclosed the names of three other symbol informers who were prominent members of the Memphis black community. I did not use their names but David Garrow did.)

Do you for a minute agree with Judge Bork, that release of information to any member of the public, like a little-known writer, "has the potential to result in greater dissemination than would release to an investigative committee of the Congress," whose proceedings were daily on coast-to-coast radio and TV, in addition to other reporting and publication by the committee? Is this also not activism as well as dishonesty essential to the reaching of a predetermined conclusion?

There is more for which I do not now take your time but if you would like to know more, please ask and I'll do what I can. If you want to check any of this my lawyer in that litigation is Jim Lesar, 393-1921.

I fear very much that this administration is out to convert us to an authoritarianism, to the degree it can, and that part of this is packing the judiciary with ideologues. So, I hope you will oppose the Bork confirmation.

Sincerely,

Harold Weisberg

properly withheld a report on suspected organized crime in labor unions under FOIA exemption 7(C), on the grounds that it was a criminal investigatory file which if released would invade the privacy of a number of persons named in the report. The Union had argued that portions of the report had already been leaked to the media and that it was entitled to further discovery of how the leaks occurred, but the court prevented further discovery, finding sworn affidavits of Department officials sufficient to establish that the leak was unauthorized and that efforts to find it had failed.

In Weisberg v. Dep't of Justice, 745 F.2d 1476 (D.C. Cir. 1984), an author and historian filed an FOIA request with the Attorney General for information concerning the FBI's investigation of Dr. Martin Luther King, Jr.'s assassination. Dissatisfied with the disclosures he obtained, the individual alleged that the Justice Department did not perform an adequate and good faith search of its records. Judge Bork sat on a three-judge panel which unanimously affirmed the District Court's dismissal of the case.

According to the panel opinion by Judge Starr, the Justice Department had the burden of showing that it had conducted a "search reasonably calculated to uncover all relevant documents." Noting that the plaintiff received 60,000 documents pursuant to his request, the panel found that the search efforts of the Justice Department were "entirely reasonable and adequate."

The panel also found that the government had properly withheld identities of persons investigated, information about third persons mentioned in the documents, and names of FBI special agents pursuant to Exemption 7, the law enforcement exemption. According to the panel, it did not matter that the names of two informants had been released to an investigative committee of Congress. "Release of such information to a member of the public interested in scholarly analysis and publication has the potential to result in greater dissemination than would release to an investigative committee of Congress," the panel stated.

In Stebbins v. Nationwide Mutual Insurance Company, 757 F.2d 364 (D.C. Cir. 1985), an individual alleged that the Equal Employment Opportunity Commission unlawfully denied his requests for disclosure of records under the FOIA. The District Court found that the individual failed to exhaust his administrative remedies and dismissed the case. A three-judge panel including Judge Bork unanimously affirmed dismissal of the case. Judge Edwards wrote the opinion, which held that exhaustion of administrative remedies is required under the FOIA before a party can seek judicial review.

In Dettman v. Dep't of Justice, 802 F.2d 1472 (D.C. Cir. 1986), an individual submitted an FOIA request to the FBI for